FILE COPY

Office Supreme Court
NOV 8 1
CHARLES ELMORE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1935.

No. 83.

NORMAN W. BINGHAM, Jr., ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR PETITIONERS.

GEORGE S. FULLER,
*Attorney for the Petitioners.*

L. H. Lane, Law Printer, 221 High Street, Boston.

## TABLE OF CONTENTS.


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| The Question Presented | 2 |
| Statement of the Case | 2 |
| Four Berkshire Policies | 3 |
| The Connecticut Policy | 5 |
| The Questions | 6 |
| The Statute Involved | 6 |
| I. The Case of Lewellyn v. Frick, 268 U. S. 238, is Controlling | 7 |
| A. The Issues and Facts Involved in the Frick Case are Indistinguishable from Those in the Case at Bar | 7 |
| B. The Frick case established the proposition, in no doubtful terms, that § 402 (f) of the 1918 Act should not be construed to apply to insurance policies, the proceeds of which were receivable by beneficiaries other than the estate, where such beneficiaries' rights were created before that Act was passed | 10 |
| C. The decision in the Frick case has never been questioned by the Supreme Court but, on the contrary, has been several times recognized by it as having settled the question as to the construction to be given to the 1918 Act | 19 |
| D. The fact that the assignment of the Berkshire policies was to the wife "provided she survives me", and that the Connecticut policy was payable to the wife or, if she died before the insured, to his children, or, if no such children or descendants of such children then living, to the insured's estate, furnishes no warrant for the inclusion of such policies | 22 |
| II. If, Notwithstanding the Frick Case and the Cases Above Referred to, this Court Feels that we Get to the Consti- | |

Page

tutional Point, we Submit that, Inasmuch as the Decedent Retained no Control Over the Policies or their Proceeds, and as the Rights of the Beneficiaries were Beyond the Control of the Decedent Before the 1918 Act was Passed, the Constitutional Point is Already Settled Against the Government by the Case of Nichols v. Coolidge, 274 U. S. 531 . . . . . 31

III. Conclusion . . . . . 35

---

## TABLE OF AUTHORITIES AND CASES CITED.

---

Blodgett v. Holden, 275 U. S. 142, 148 . . . . . 19

Boyden v. Massachusetts Mutual Life Insurance Company, 153 Mass. 544 . . . . . 5

29 B. T. A., 1306 at 1311 . . . . . 24

1935 C. C. H. Fed. Tax Service, Par. 9543 . . . . 24

Chase National Bank v. United States, 278 U. S. 327, 333, 19, 21, 28, 34

Coolidge v. Long, 282 U. S. 582 . . . . . 31, 32, 33

General Laws, Chapter 175, Sections 126, 144 . . 5

Gwinn v. Commissioner, 287 U. S. 224, 229 . . . . 33

Haskell v. Equitable Life Insurance Company, 181 Mass. 341 . . . . . 5

Heiner v. Grandin, 44 F. (2) 141 . . . . . 20

Helvering v. Duke, 290 U. S. 591 . . . . . 28

Helvering v. Grinnell, 294 U. S. 153 . . . . . 21, 28

Helvering v. St. Louis Union Trust Co., 75 F. (2d) 416 . 27

Industrial Trust Company v. United States . . . 24

Judicial Code, Section 240 (a) as amended by Act of February 13, 1925 . . . . . 1

Levy's Estate v. Commissioner, 65 F. (2) 412 . . . 22, 23

Lewellyn v. Frick, 268 U. S. 238 . . 3, 7, 10, 20, 34, 35

Liebes v. Commissioner, 63 F. (2) 870 . . . . . 20

Page

Massachusetts Acts of 1887, Chapter 214, Section 76 . 5
Acts of 1894, Chapter 522 . . . 5
May v. Heiner, 281 U. S. 238 . . 25, 26, 28, 30, 34, 35
McCormick v. Burnet, 283 U. S. 784 . 25, 26, 27, 28, 30, 35
Nichols v. Bradley, 27 F. (2) 47 . . . . . 29
Nichols v. Coolidge, 274 U. S. 531, 539 . 19, 31, 33, 34
Pingrey v. National Life Insurance Company, 144 Mass. 374, 5
Revenue Act of 1918, Sec. 401 . . . . . 7
Sec. 402 (c) . 18, 25, 26, 27, 28, 33, 35
Sec. 402 (f) . . . . . 2, 6, 7, 10, 16, 18, 19, 26, 27, 33, 35
Revenue Act of 1924, Sec. 302 (g) . . . . . 22
Saltonstall v. Saltonstall, 276 U. S. 260 . . . . 21, 29
Sampson v. United States, 1 Fed. Supp. 95 . . . 34
Sargent v. White, 50 F (2) 410 . . . . . 29
Schwab v. Doyle, 258 U. S. 529, 534 . . . . 25
Scott v. Commissioner, 69 F. (2) 444 . . . . 21
The Pennsylvania Company for Insurance on Lives and Granting Annuities v. Commissioner . . . . . 24
Third National Bank v. White, 287 U. S. 577 . . . 33
Tyler v. Treasurer and Receiver General, 226 Mass. 306 . 17
Tyler v. United States, 281 U. S. 497 . . 21, 27, 28, 32
Wallace v. Commissioner, 27 B. T. A. 902 . . . 28, 30
Wuchter v. Pizzutti, 276 U. S. 13, 27 . . . . 19

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1935.

No. 83.

NORMAN W. BINGHAM, JR., ET AL.,
PETITIONERS,
*v.*
THE UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR PETITIONERS.

### OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts (R. 61) is reported in 7 Fed. Supp. 907. The opinion of the Circuit Court of Appeals (R. 83) is reported in 76 Fed. (2) 573.

### JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 26, 1935 (R. 92). The petition for a writ of certiorari was filed May 29, 1935 and was granted October 14, 1935. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## THE QUESTION PRESENTED.

This case raises the question as to whether the proceeds of certain life insurance policies taken out by a decedent on his own life, which, long before 1918, were assigned or made payable to named beneficiaries other than his estate, with no power reserved to the decedent to revoke the assignment or change the beneficiary, were subject to tax under the insurance clause (§ 402 (f)) of the Estate Tax provisions of the Revenue Act of 1918.

## STATEMENT OF THE CASE.

The facts were stipulated (R. 7) and may be summarized as follows:

The petitioners are the Executors under the will of King Upton, late of Massachusetts, who died on February 27, 1921, during the period covered by the Revenue Act of 1918. (The Revenue Act of 1921 was not enacted until 1922.)

At the time of the decedent's death, there were seventeen policies of life insurance payable to beneficiaries other than his estate, the proceeds of which amounted to $88,284.96. After deducting the specific exemption of $40,000, the balance, $48,284.96, was included in the decedent's gross estate for the purpose of the Federal Estate Tax. The proceeds of ten of these policies amounted to $58,950.14 and no question is raised as to the propriety of such inclusion under Section 402 (f) of the Revenue Act of 1918.

The proceeds of the other seven policies, some of which were payable to the widow and some to the son of the decedent, amounted to $29,369.86. The action in the District Court was to recover the amount of tax

paid on account of the inclusion of these proceeds as part of the decedent's estate.

The District Court held that all of the seven policies fell within the case of *Lewellyn* v. *Frick*, 268 U. S. 238, and that, therefore, none of the proceeds should have been included within the gross estate of the decedent and entered judgment for the taxpayers accordingly.

The Circuit Court of Appeals for the First Circuit sustained the judgment of the District Court as to two of the policies, and no question has been raised by the Government as to those two policies.* That Court reversed the District Court, however, as to the other five policies.

The essential facts as to these five policies are as follows:

**FOUR BERKSHIRE POLICIES.**

These were issued in 1891–1895 in Massachusetts to the decedent, who was also of Massachusetts, by the Berkshire Life Insurance Company of that state, for $5,000 each, originally payable to his estate. On June 30, 1904, he assigned the four policies to the insurance company to secure a loan of $5900, which loan remained unpaid until his death, when it was deducted from the proceeds of the policies, making their net proceeds $14,334.49. On July 25, 1904, he assigned the four poli-

* Note.—These were for $5,000 each, issued by the Manhattan Life Insurance Company, of New York, payable on the decedent's death,—one "to his son, George Upton, his executors, administrators or assigns;" and the other "to Mrs. Annie D. Upton, his wife, her executors, administrators or assigns." No right was reserved to change the beneficiary or to assign or pledge the policies, nor did they contain any cash surrender value provisions. The Court below excluded the proceeds of these policies from the gross estate, because the beneficiaries had been irrevocably designated (R. 88). The Government is not seeking review as to these two policies.

cies to his wife, Annie D. Upton. The assignment, which was on one of the Company's printed forms the original of which was filed with the Company, read as follows (see R. 35):

> "The original and duplicate Assignment should be sent to the Home Office of the Company, where date of receipt will be endorsed and record made. The original will be retained on file and the duplicate returned.
> Assignment (Ed. 1902. Form E. 1M.)
> Policies 35,098, 41,714, 47,954, 47,955. (Original)
> In consideration of love, affection, and one dollar, I do hereby assign all my right, title and interest in policies number 35,098, 41,714, 47,954, 47,955 issued by the
>
> BERKSHIRE LIFE INSURANCE COMPANY OF PITTSFIELD, MASS.
>
> insuring the life of King Upton of Salem, Mass. and all additions to said policy, whether now or hereafter apportioned, (reserving and excepting the right to the assured to apply the cash value of any dividends thereon in payment of premiums hereafter due on said policy) unto my wife, Annie D. Upton, provided she survives me. This assignment is made subject to a previous assignment to the Berkeshire Life Ins. Co. dated June 30, 1904.
> Dated at Boston, Mass. this 25th day of July, A. D. 1904.
> In the presence of /s/ KING UPTON (Seal)
> /s/ Thos. Courtis."

On the back of the assignment:

> "35,098
> 41,714 Received at Home Office
> 47,954-5
> 397 /s/ THEO. L. ALLEN, Sec'y."
> (R. 35)

None of these four policies contained any reservation to the insured of a power to change the beneficiary or

to pledge or assign the policies, nor did the decedent reserve any power to revoke the assignment to his wife. Under the law of Massachusetts, these policies could not be surrendered by the insured without the consent of the beneficiary or assignee (Massachusetts Acts of 1887, Chapter 214, Section 76; Acts of 1894, Chapter 522; General Laws, Chapter 175, Sections 126, 144), *Haskell* v. *Equitable Life Insurance Company,* 181 Mass. 341; *Pingrey* v. *National Life Insurance Company,* 144 Mass. 374; *Boyden* v. *Massachusetts Mutual Life Insurance Company,* 153 Mass. 544.*

No change in the situation was thereafter made, and the proceeds of the four policies, after deducting the amount due on the loan, were paid by the Insurance Company to the assignee, said Annie D. Upton, shortly after the decedent's death (R. 15, 21, 27, 33).

### THE CONNECTICUT POLICY.

This policy (R. 43, 45) for $5000 was taken out by the decedent in 1883 in the Connecticut Mutual Life Insurance Company, a Connecticut company. It was a ten payment life policy and became a paid-up policy on May 22, 1893, *i. e.* upon the payment of ten annual premiums during the ten year period beginning May 22, 1883.

Under the terms of the policy, the proceeds were pay-

* The Massachusetts statutes specifically provide that "no surrender of a policy shall be made without the written assent of the person to whom the policy is made payable," and that every policy payable to a married woman, "or after its issue assigned, transferred or in any way made payable to a married woman," shall inure to her separate use and benefit. In *Haskell* v. *Equitable Life Assurance Society,* 181 Mass. 341, the policy was payable to the wife, or if she were not then living, to the insured's estate, and it was *held* that, notwithstanding the nature of the wife's right, the insured could not surrender the policy without her consent.

able "to Annie Upton (the Assured), wife of the said Insured [King Upton, the decedent], for her sole use and benefit, or to her legal representatives, . . . or if the said Assured die before said Insured, the said sum insured shall be payable as above to his children, or to their guardian, if under age; or if there be no such children or descendants of such children then living, the said sum insured shall be payable to the legal representatives of the said Insured; . . ."

No right was reserved by the Insured to change the beneficiary or to assign or pledge the policy.

The policy also contained a provision to the effect that during the thirty day period immediately following the end of ten years from the date of the policy, or during such period immediately following the end of each five years thereafter, the Insured might surrender the policy for cash. The end of the last five year period prior to the Insured's death came on May 22, 1918, and the end of the next five year period did not come until May 22, 1923, over two years after the decedent's death. The Company had no other right to accept a surrender and discharge of the policy except when made by *both* the Assured (Annie Upton) and "the payee of the cash value" (the Insured), King Upton.

## THE QUESTIONS.

*First*: Whether Section 402 (f) of the Revenue Act of 1918 should be construed to apply to the proceeds of policies receivable by a beneficiary other than the Estate, where the policies had been taken out and made payable or assigned to the beneficiaries before the passage of that Act?

*Second*: If so construed and applied, was Section 402 (f) of the Revenue Act of 1918 constitutional?

## THE STATUTE INVOLVED.

The pertinent provisions of the Revenue Act of 1918 are as follows:

> "Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:"
>
> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> . . . . . .
>
> (f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

## I.

## THE CASE OF LEWELLYN v. FRICK, 268 U. S. 238, IS CONTROLLING.

### A. The Issues and Facts Involved in the Frick Case are Indistinguishable from Those in the Case at Bar.

The questions before the Court in the *Frick* case were identical with the questions before the Court in the case at bar, *i. e.*, whether Section 402(f) of the Revenue Act of 1918 should be construed to apply to the proceeds

of the policies under consideration, where the policies had been taken out and assigned or made payable to the beneficiaries before the passage of the 1918 Act; and if so construed and applied, was that section constitutional.

The facts as to the policies involved in the two cases are indistinguishable. In each case the policies involved were taken out and assigned or made payable to the beneficiaries *before* the 1918 Act was passed, and the decedent continued to pay the premiums. In nine out of the eleven policies involved in the *Frick* case, the language of the policies as to the interest of the beneficiary, like in the case at bar, was such that if the beneficiary did not survive Mr. Frick, the proceeds were payable on Mr. Frick's death to his estate,* *e. g.*

*Berkshire*—$20,000—to the daughter "if she survives me; otherwise" to the estate.

*Connecticut Mutual*—$50,000—to daughter "except that if I shall survive such assignee, all right, etc. shall revert to me."

*Equitable Life*—($114,000)—"to (wife) if living, if ($50,000) not, then to" Mr. Frick, his executors, etc.

*Mutual Benefit*—$10,000—"to (daughter) in case she survives the insured. Otherwise" to the estate.

*Nederland*—$20,000—"to (daughter), or if she shall not then be living, to" the estate.

*State Mutual*—$20,000—to daughter "but only in the event of the decease of the said insured prior to that of said beneficiary; with the

* Note.—All the material facts as to each of the policies involved in the *Frick* case are set forth in the stipulation as to Facts in the Transcript of Record, and in the Appendices to the Government's and the Frick Estate's briefs, in this Court, reference to which is hereby made.

express provision that if the said insured shall survive the said beneficiary, . . . then this policy and all rights thereunder shall revert to said insured."

*New York Life*—$65,000)—to daughter "provided
$25,000)
that in the event of the prior death of the said (daughter) this assignment is null and void and of no effect."

The Berkshire policy referred to above was taken out in the same Berkshire Company which issued the four Berkshire policies in the case at bar. This policy was *assigned* by Mr. Frick in 1917 to his daughter, the language of such assignment being that he assigned it to her "if she survives me, otherwise" to his estate. *The situation as to this policy, therefore, is identical to the situation as to the four Berkshire policies in the case at bar.*

The Connecticut policy referred to above was taken out by Mr. Frick in 1890 in the same Connecticut Company which issued the Connecticut policy in the case at bar. This policy contained the *same kind* of *limited cash surrender value* provisions as were contained in the Connecticut policy in the case at bar. In 1917, Mr. Frick assigned this policy to his daughter, "except that if I shall survive such assignee, all right, title and interest therein shall revert to me". *Therefore, the situation as to this policy differed in no material respect from the situation as to the Connecticut policy in the case at bar.*

In the case of five of those nine policies in the *Frick* case, the decedent had one or more of the following powers, to wit:—

To revoke the assignment;
To change the beneficiary;
To surrender the policy for cash;
To pledge it for loans.

None of those situations existed as to any of the policies in the case at bar. Therefore, if none of those five policies in the *Frick* case came within Section 402 (f) of the 1918 Act, as held by this Court, *a fortiori,* none of the policies in the case at bar come within that Act.

**B. The Frick case established the proposition, in no doubtful terms, that § 402 (f) of the 1918 Act should not be construed to apply to insurance policies, the proceeds of which were receivable by beneficiaries other than the estate, where such beneficiaries' rights were created before that Act was passed.**

Inasmuch, however, as the question is now before this Court again, and as the Government appears to consider that the *Frick* case is no longer controlling as to the various kinds of policies which were involved in that case, we deem it worth while to refer briefly to some of the points made by the Frick Estate in its brief before this Court. We do this for three reasons: *First,* because it makes it absolutely clear that this Court's decision was made after its attention had been called to the various differences between the policies and must, therefore, be deemed to have been intended to apply to every kind of policy there involved, *notwithstanding* such differences; *second,* because, if this Court deem the question still open, the taxpayers in the case at bar adopt the same arguments and insist that they are just as valid and conclusive now as they were then; and *third,* because it will become immediately apparent after

examining the opinion of this Court and the Frick Estate's brief, that *this Court adopted substantially the same line of reasoning* in reaching the same conclusion, to wit, that Section 402 (f) of the 1918 Act was not intended to apply to any of the policies there involved, policies which are indistinguishable from those in the case at bar.

After referring to the summary in the appendix to its brief for a description of the various policies, it pointed out that they fell into four classes (F. Brief, 15–16):

1. Policies originally taken out in the name of the beneficiary with no power to change the beneficiary.
2. Policies originally payable to the estate, with no provision for change of beneficiary, but which were subsequently assigned by Mr. Frick *to his wife, or, if she did not survive him,* to his estate, without reserving power to revoke the assignments.
3. Policies which were assigned with powers reserved to revoke the assignments.
4. Policies which were originally payable to the Executors and which subsequently, by arrangement with the Company, he made payable to his daughter as beneficiary without power to change the beneficiary.

It then pointed out that an attempt had been made in the Court below to point out some differences as affecting ownership of these policies because *some of them contained certain options which Mr. Frick might have exercised,* and because when he assigned some of them *he reserved in the assignments certain powers;* and it argued that so long as Mr. Frick did not exercise any of these options or powers, the contracts were not affected by them. (F. Brief, 17.) (This

is important because it shows not only that this point was called to the Court's attention, but also that it must have considered that the fact that Mr. Frick had such options or powers did not affect its ultimate conclusion that the 1918 Act was not intended to apply *even to such policies*. *A fortiori*, then, the point now pressed by the Government in the case at bar as to the beneficiary's losing his or her right to the proceeds in case he or she did not survive the insured, could not have been deemed to have been material and would not have affected this Court's conclusion. Certainly, if Congress did not intend the 1918 Act to apply to policies where the insured had power to revoke the assignment or change the beneficiary, *a fortiori* Congress did not intend that Act to apply where the insured had no such power *and had only the possibility of having the proceeds payable to his estate in case the beneficiary did not survive him!)*

It then referred particularly to the Equitable Life policy, pointing out that that Company had agreed "to pay Mrs. Frick $114,000 at Mr. Frick's death, *if she were then living,* and if not" to his estate (F. Brief, 18); and it referred again to its proposition that the Government could not distinguish in the matter of ownership between this policy and some of the others which gave Mr. Frick certain powers, such as the power to surrender the policy for cash or where he had reserved power to revoke the assignments or power to change the beneficiary, without having exercised such powers. (F. Brief, 20.)

Again, at F. Brief, 28–29, it referred to the attempt in the Court below to show that the existence of these powers prevented the "estate" from vesting in the beneficiary, and then went on to say:

> "We are at a loss to see what application this contention has to the case; for it is the estate of the beneficiary that is being taxed here. That estate, whether you call it vested or contingent, came into

being when the contract creating the obligation to pay the policy to the beneficiary was made, and continued unmodified by the exercise of options or powers right down to the death of the insured, when the policy became payable at once to the owner of the estate. It is perfectly clear that Mr. Frick's so-called rights were not 'conditions of the vesting of the estate' (if we must use this inaccurate expression), but were simply conditional limitations."

Also, at F. Brief, 30, it pointed out that Mrs. Frick's right (estate) became her property (vested) when the policy was issued or the assignment thereof was made, and could only be divested by a subsequent event which never happened; and then it argued that the existence of such unexercised power in a donor does not subject the property given to taxation as part of his estate. (There is nothing in the *Chase Bank* case to indicate that this line of argument was no longer valid when the question was merely as to whether Congress intended that Section 402 (f) of the 1918 Act apply to such policies where they had been taken out and assigned or the beneficiaries part of his estate. ~~(There is nothing~~ In the *Chase Bank* case, the policies had been taken out *after* the Act there involved had been passed, and the question was as to the *power* of Congress as to such a policy, it being clear that the Act was intended to apply to all policies taken out *after* that Act.)

It was further argued that Section 402 (f) was not retroactive (F. Brief, 33); that the cases of *Schwab* v. *Doyle; Union Trust Co.* v. *Wardell; Levy* v. *Wardell;* and *Knox* v. *McElligott,* 258 U. S. 529 ff., were identical with one another and with the *Frick* case with respect to retroactivity (F. Brief, 35); and that the language construed in *Levy* v. *Wardell* (§ 202 (b) of the 1916 Act), imposing a tax on property "to the extent of the interest therein of which the decedent

has *at any time* made a transfer", gave much more basis for saying that a retroactive effect was intended than did that used in Section 402 (f) of the 1918 Act, and yet it was held not to apply to transfers made before the 1916 Act was passed. (F. Brief, 38.)

Until the 1918 Act, none of the subdivisions of Section 402 had been expressly retroactive, but in that Act, realizing that the provisions of subdivision (c) relating to transfers made in contemplation of death did not cover transfers completed before that Act, Congress inserted the words, "whether such transfer or trust is made or created before or after the passage of this Act". *The significant thing* is that Congress, although its attention was specifically directed to the fact that none of the provisions of Section 402 as they then read were applicable to past transactions, *chose to make them so only* as to transfers within subdivision (c). That, in itself, amounted to a legislative declaration that the other provisions were not intended to be retroactive in their operation in the Act of 1916, nor, *a fortiori,* in the 1918 Act, in which the provision as to insurance policies was first inserted. (F. Brief, 39.)

Exactly such a construction was adopted by this Court in *Knox* v. *McElligott,* 258 U. S. 546, a case of a joint estate, and involving Section 202 (c) of the 1916 Act as amended in 1917. The history of that provision was exactly parallel to that of the insurance tax provision. Subdivision (c) covered interests "held" jointly, or "deposited" in joint names. § 402 (f) of the 1918 Act covered proceeds of policies "taken out" by the decedent upon his own life. A closer parallel of grammatical construction could scarcely be imagined. The *Knox* case held that the language quoted did *not* cover joint estates created before the 1916 Act. (F. Brief, 40.)

The Government's position would require Section 402 (f) of the 1918 Act to be construed as though there had been added at the end of it the words,

"whether such policies were taken out before or after the passage of the Act". (F. Brief, 42.)

The fact that in the 1924 Act Congress added an express provision making the insurance clause apply to policies taken out before the Act (see § 302 (h) of the 1924 Act, expressly applying to subdivision (f), the insurance clause, of that section) showed that Congress recognized that the insurance clause in the previous Act had not so applied. (F. Brief, 42.) Citing *Schwab* v. *Doyle*, 258 U. S. 529; *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602; *United States* v. *Field*, 255 U. S. 257.

A further cogent reason why Section 402 (f) of the 1918 Act should not be construed to apply to the proceeds of policies taken out or assigned from two to thirty-five years before its enactment, rests on the fact that the contrary construction insisted upon by the Government was open to a number of serious constitutional objections. (F. Brief, 44–45.)

And finally at F. Brief, 45–46, it was argued:

> "The language of subdivision (f) of Section 402, under which this tax was collected, does not in terms include the proceeds of the policies in question. It is not to be construed retroactively in the absence of unequivocal language compelling that construction. If ambiguous, it is to be construed in favor of the taxpayer, and so as to avoid the grave constitutional difficulties which inhere in the Government's position. By all the canons of construction, and in the light of the prior and subsequent legislative history of this and its companion provision, it must inevitably follow, on the authority of the cases decided by this Court, that Congress did not intend by the provision in question to impose an estate tax retroactively upon policies of insurance taken out and assigned at a time long prior to the enactment of the taxing Act."

It was also argued that the Act was unconstitutional in that the amount of tax which the beneficiary of an insurance policy would be required to pay would vary according to the amount of the rest of the decedent's estate, and also in that it required Mr. Frick's estate to pay a tax on account of property which he did not transfer. The payments made to the beneficiaries by the insurance company were never the property of Mr. Frick. He merely paid the premiums for a contract on the part of the insurance company to make a payment to his beneficiary at his death.

It is in the light of such arguments on the part of the Frick Estate that the opinion of this Court must be read, and we particularly refer to the last paragraph of that opinion which we here quote for convenience, for we believe it will now take added significance and make it perfectly clear that this Court there definitely declared, and intended to declare, that Section 402 (f) of the 1918 Act should be construed so as not to apply to any of the policies there involved or such as are involved in the case at bar:

> "We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. There would be another if the provisions for the liability of beneficiaries were held to be separable and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle "that the

laws are not to be considered as applying to cases which arose before their passage" is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways. *Schwab* v. *Doyle*, 258 U. S. 529, 534. This case and the following ones, *Union Trust Co.* v. *Wardell*, 258 U. S. 537, *Levy* v. *Wardell*, 258 U. S. 542, and *Knox* v. *McElligott*, 258 U. S. 546, go far toward deciding the one now before us. They also indicate that the Revenue Act of 1924, c. 2, § 302(h); 43 Stat. 250, 305, making (g) (the equivalent of (f) above) apply to past transactions, does not help but if anything hinders the Collector's construction of the present law. *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602."

It must be remembered, particularly in applying the long and well established principle that statutes should be so construed as to avoid grave doubts as to the constitutionality, that in construing the insurance clause of the 1918 Act, it must be looked at in the light of the condition of the law *at that time*. One of the leading cases in the United States which was looked to as determining the nature and effect of a life insurance policy from the point of view of death taxes on its proceeds was *Tyler* v. *Treasurer and Receiver General*, 226 Mass. 306, which held that the rights of the beneficiary attach at once upon her being named, and vest instantly upon a meritorious consideration, and take complete effect as of that time; *that they do not wait for their efficacy upon the happening of a future event;* that the insured retains no ownership of that which has passed to the beneficiary under the contract; *that whatever the insured does in way of designation of a beneficiary takes effect forthwith;* and that, by designating a beneficiary,

both the grant and gift take effect in possession and enjoyment at once. Similar results had been reached by the Courts of other states. Certainly, then, in view of such a state of the decisions, it was *in fact* a matter of grave doubt whether Section 402 (f) of the 1918 Act would be constitutional if applied to such policies as we have in the case at bar, and a construction which would avoid that doubt was required. *Furthermore,* the very fact that Congress inserted a retroactive provision in Section 402 (c) in the 1918 Act and did not insert it in Section 402 (f) furnishes a definitive indication that Congress had that grave doubt in mind at that time.

The fact that in 1929, about five years after the *Frick* case, and about eleven years after the 1918 Act, this Court used language in the *Chase Bank* case which, although the policy there involved was taken out after the Act in question (the 1921 Act) was passed, might be construed to apply also to policies taken out before the Act was passed *where the decedent had reserved the power to control the policies,* surely cannot be said to furnish any warrant for now holding that the intent of Congress in Section 402 (f) of the 1918 Act must be determined in the light of that 1929 decision and other later decisions, or that the *Frick* case was in effect overruled as to *any* of the kinds of policies which it involved where the 1918 Act is involved.

**C. The decision in the Frick case has never been questioned by the Supreme Court but, on the contrary, has been several times recognized by it as having settled the question as to the construction to be given to the 1918 Act.**

In *Nichols* v. *Coolidge,* 274 U. S. 531, at 539, the majority of the Court says as to this case:

> "Under *Lewellyn* v. *Frick,* 268 U. S. 238, at 251, only such (subsequent) transfers come within § 402 (f)" (of the 1918 Act).

*That is a definite reaffirmance by that Court that § 402 (f),* the section on which the Government is relying in the case at bar, is *not* to be construed as applying to policies where the rights of the beneficiaries are established before the 1918 Act was passed,—at least where such rights are established beyond the control of the decedent.

In *Blodgett* v. *Holden,* 275 U. S. 142, at 148, in the opinion of Mr. Justice Holmes, in which Justices Brandeis, Sanford, and Stone concurred, the *Frick* case is cited in support of the proposition that it is the usual understanding "that statutes direct themselves to future, not to past transactions".

In *Wuchter* v. *Pizzutti,* 276 U. S. 13, at 27, in the dissenting opinion of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, the *Frick* case is cited to the point that "a construction which raises a serious doubt as to the constitutionality of a statute will not be adopted if some other construction is open".

And finally, in *Chase National Bank* v. *United States,* 278 U. S. 327, at 333, the Court, after stating the constitutional questions raised in the case then before it (the *Chase Bank* case), says:

"Similar questions were mooted by counsel, but not decided, in *Lewellyn* v. *Frick*, 268 U. S. 238, 251."

It thus appears that the Court in the Chase case expressly recognizes the *Frick* case, and that the decision was such that the constitutional question was avoided. But as the only way the Court could possibly have avoided deciding a constitutional question in the *Frick* case was by deciding that the 1918 Act did not apply to such policies as were involved in that case, it must follow, as a necessary conclusion, that the *Frick* case was good law on the only point decided by it, to wit: the point as to how the 1918 Act should be construed.

Furthermore, it must also be noted that Mr. Justice Holmes, who had written the opinion of the Court in the *Frick* case, apparently was in full accord with the decision and opinion of the Court (written by Mr. Justice Stone) in the *Chase Bank* case, and it is hardly conceivable, therefore, that anything said or decided in the *Chase Bank* case was intended to overrule or cast a doubt upon the decision in the *Frick* case, especially when expressly referring to the *Frick* case.

Whatever doubts have sprung up as to the *Frick* case being still the law as to the non-application of Section 402 (f) of the 1918 Act to such policies as are involved in the case at bar, appear only in lower court decisions, such as *Heiner* v. *Grandin*, 44 F. (2) 141 (3d C. C. A.), and *Liebes* v. *Commissioner*, 63 F. (2) 870 (9th C. C. A.). Such doubts appear, however, to be based upon the Court's failure to appreciate the difference between the principles and questions involved in cases such as the *Frick* case which dealt only with the meaning and

application of statutory provisions, and those involved in cases such as the *Chase Bank* case; *Saltonstall* v. *Saltonstall*, 276 U.S. 260; *Tyler* v. *United States*, 281 U.S. 497; and similar cases in which this Court was not concerned with the meaning or application of the Act but only with questions as to the *power* of Congress,—questions as to constitutional validity of the Act. (See *Helvering* v. *Grinnell*, 294 U.S. 153.)

Furthermore, neither the *Grandin* case nor the *Liebes* case can fairly be said to cast any doubt as to applicability of the *Frick* case to such policies as we have in the case at bar. In both of those cases, the decedent had retained control over the policies and the disposition of their proceeds, and it was only on that ground that those courts, erroneously we believe, held the proceeds of the policies were taxable under the 1918 Act, notwithstanding the *Frick* case. In the case at bar, however, the decedent had retained no such control over, and had none of the incidents of ownership in, the policies or their proceeds. Certainly a mere possibility that the policies might become payable to his estate in case the beneficiary should happen to predecease him cannot be said to be an "incident of ownership" within any ordinary or natural meaning of those words!

In *Scott* v. *Commissioner*, 69 F. (2) 444 (8th C.C. A), the Court expressly recognized that the *Frick* case controlled as to cases arising under the 1918 Act and that it established that that Act did not apply to policies taken out and assigned or made payable to beneficiaries before that Act was passed, *even though the decedent had power to change the beneficiary*.

**D. The fact that the assignment of the Berkshire policies was to the wife "provided she survives me," and that the Connecticut policy was payable to the wife or, if she died before the insured, to his children, or, if no such children or descendants of such children then living, to the insured's estate, furnishes no warrant for the inclusion of such policies.**

As already shown, the same situation existed as to nine of the eleven policies involved in the *Frick* case, and was there made sufficiently apparent in the Estate's brief.

The case of *Levy's Estate* v. *Commissioner*, 65 F. (2) 412, (2nd C. C. A.) is inconsistent with Government's contention and decision of the Court below in the case at bar. In that case the decedent in 1916 cancelled his right to change the beneficiary as to forty-four of the policies there involved and irrevocably made his wife the beneficiary of a 3 percent annuity in the proceeds, but retained the power to change or revoke the designations of those who were to benefit after the decease of the wife. The question was whether the proceeds should be included in the decedent's gross estate under Section 302 (g) of the Revenue Act of 1924, the provisions of which were identical with Section 402 (f) of the Revenue Act of 1918. Section 302 of the 1924 Act, however, also contained a subdivision (h) which expressly made subdivision (g) apply to transfers, interests, rights, etc. "whether made, created, arising, existing, etc. before or after the enactment" of that Act.

The Court in the *Levy* case held that in view of the decedent's retained power of control, the proceeds were taxable, except to the extent of the value of the 3 percent annuity to the wife, but that the value of that

annuity was *not* to be included inasmuch as the wife had been irrevocably designated as the beneficiary of that annuity in 1916 and as the decedent no longer had any power to surrender, assign, or borrow on the policies so as to affect her right to that annuity without her consent.

Inasmuch as the wife's interest in the *Levy* case was merely the right during her life to an annuity equal to 3 percent of the proceeds, *i. é.*, a right during her life to receive annually an amount equal to 3 percent of the proceeds, it necessarily followed that she could receive that annuity only in case she survived the decedent. If she should not survive the decedent, he would, upon her death, have come into control of the *entire* proceeds of the policy.

We submit, therefore, that the case at bar cannot be distinguished from the *Levy* case on the Government's point as to the alleged contingent character of the beneficiary's interest in the proceeds of the policies.

As to that annuity the Court said (at page 415):—

> "Therefore, to the extent of the 3 percent annuity, the insured had no rights after he had irrevocably designated his beneficiary. The value of the annuity cannot be taxed. The fact that the insured continued to pay premiums after the applicable Revenue Acts were passed, does not affect the result. To the extent of this annuity only the order should be modified, for it may not be taxed."

We submit that those words and that conclusion apply with at least equal force to the proceeds of all of the policies in the case at bar. Mr. Upton had no rights after he had irrevocably designated his wife as the beneficiary. True it is, that the wife would have received nothing, and the control of the proceeds would

have reverted to Mr. Upton if his wife had predeceased him; *but that was equally true in the Levy case.* In the case at bar, just as much as in the *Levy* case, the interest of the beneficiary had been irrevocably established before the 1918 Act (the first Act to contain such an insurance provision) was passed, *beyond all possibility of control* on the part of the decedent. If such an interest did not come within Section 302 (g) of the 1924 Act, *a fortiori* it did not come within Section 402 (f) of the 1918 Act.

For the same reason we submit that the decision of the Court of Claims in *Industrial Trust Company* v. *United States* (which case is now before this Court on certiorari granted, No. 213, October Term, 1935) is erroneous, the interests of the beneficiaries in that case having been irrevocably established before the 1918 Act.

The case of *The Pennsylvania Company for Insurance on Lives and Granting Annuities* v. *Commissioner*, decided by the Circuit Court of Appeals for the Third Circuit on August 8, 1935, not yet appearing in the Federal Reporter, (but see 1935 C. C. H. Fed. Tax Service, Par. 9543), is also inconsistent with the decision of the Court below in the case at bar. This case came up on appeal from the Board of Tax Appeals, 29 B. T. A. 1306. Policies Nos. 15, 16, 17, 18 and 20, referred to in the opinion were payable to the decedent's wife "if she survives him, otherwise to his" estate. (See 29 B. T. A. 1306 at 1311.) Also it appeared from the opinion of the Court that No. 16 contained the same kind of limited surrender provisions as are contained in the Connecticut policy in the case at bar. The Court held that although those policies contained cash surrender provisions, they could not be exercised without the consent of the owner, and that as the wife had a vested interest

in the policies, her consent was necessary as an owner, and also as to No. 16 it pointed out that between the time of the expiration of the last-five-year period and the time of his death, the decedent had no money interest in the policies. This case arose under the 1926 Act, which contained the same express retroactive provision which was in the 1924 Act applicable to the insurance clause. Notwithstanding that fact, the Court held that inasmuch as the decedent had no control over the policies without the consent of the beneficiary, the policies were not taxable as the estate of the decedent had no interest in the policy at the date of his death.

We further submit that the cases of *May* v. *Heiner*, 281 U. S. 238, and *McCormick* v. *Burnet*, 283 U. S. 784, go fully as "far toward deciding the one now before us," as do the cases of *Schwab* v. *Doyle* (*supra*) and the related cases on which this Court relied in the *Frick* case, and for like reasons. The questions before the Court in those cases were as to the meaning and scope of Section 402 (c) of the 1918 Act. The decedent's interest in the property in *May* v. *Heiner* and the *McCormick* case was of exactly the same nature as the decedent's interest in the policies in the case at bar,—a *mere possibility*. If the beneficiary predeceased the decedent, the decedent would come back into control, otherwise not. The beneficiary's interest had been just as completely established in the one case as in the other, and nothing more was added to it by the decedent's death in the one case than in the other. On the other hand, the beneficiary could no more come into the full possession and actual enjoyment of the property in those cases before the decedent's death than could the beneficiary in the case at bar. In each case the decedent's interest which he possessed immediately prior to

the death was, as said by this Court in *May* v. *Heiner*, "obliterated by that event". (Page 243.)

In *May* v. *Heiner*, the decedent (Mrs. May) had transferred the property *before* the 1918 Act, to trustees to pay the income to her husband for life, *then to herself* for life, and after her decease to her children. As this Court pointed out, it was immaterial whether Mrs. May survived her husband. "At the death of Mrs. May no interest in the property passed from her to the living; title thereto had been definitely fixed by the trust deed." (Page 243.) Then it went on to say that it was at least doubtful whether the trusts or interests in a trust intended to be reached by Section 402 (c) included any others than those passing from the possession, enjoyment or control of the donor at his death, and that doubt must be resolved in favor of the taxpayer.

It must here be remembered that Section 402 (c) of the 1918 Act which provided for the inclusion of interests in property of which the decedent *has at any time* made a transfer in contemplation of or intended to take effect at his death, also contained the phrase, *"whether such transfer or trust is made or created before or after the passage of this Act,"* whereas in Section 402 (f) there were no words or phrases of that kind from which to warrant any intent that it was to apply where the interests had been irrevocably established *before* that Act was passed.

In the *McCormick* case, the same Section 402 (c) was involved. The trust was created by the decedent before the 1918 Act. The trust was in substance to pay the income to the decedent (the settlor) for life, and then to her three children for their lives and then over, but with a provision that on the death of the last survivor

of the three children the trust was to terminate and that upon such termination, or upon an earlier termination which might be made by the settlor with the consent of any one of the three children, the corpus should be paid over *to the settlor, if she should then be living,* otherwise to the children, or their heirs, etc. Here again this Court construed Section 402 (c) as not to apply in this situation.

Certainly if Section 402 (c), containing the retroactive phrase above referred to, should not be construed to apply in such situation, Section 402 (f), having no such retroactive phrase, cannot properly be construed to apply to such a situation as we have in the case at bar.

The situation in the *Klein* case is entirely different from that in the case at bar. In that case the beneficiary had *nothing but a life estate* until the decedent's death. The decedent *had retained* the remainder in himself, and *that remainder did not pass to anyone until his death.* The distinction is most clearly pointed out in the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Helvering* v. *St. Louis Union Trust Co.,* 75 F. (2) 416 (argued before this Court on certiorari on October 24–25, 1935). Furthermore, it must follow, from the very fact that the ~~*Tyler*~~ Klein case was argued on the same day and along with the *McCormick* case, and from the fact that this Court reversed the decision of the lower Court in the *McCormick* case, (which had stressed the defeasance clause as being sufficient to make the transfer incomplete), that a mere possibilty of reverter as in the *McCormick* case, as distinguished from a retained remainder as in the *Klein* case, is *not* sufficient to bring the transfer within the 1918 Act.

The same principle was applied in *Wallace* v. *Commissioner,* 27 B. T. A. 902; affirmed per curiam 71 F. (2) 1002 (2nd C. C. A.) on the authority of *May* v. *Heiner;* certiorari denied, 293 U. S. 600. In that case the decedent created a trust to pay the income to herself for life, and on her death to pay the corpus *to her daughter "if she be living," and if the daughter predeceased her, the property reverted to the grantor.* How strikingly like the assignment and policy provisions in the case at bar! The Court held that the provisions in the 1928 Act, corresponding to Section 402 (c) of the 1918 Act, did not apply. (See also *Helvering* v. *Duke,* 290 U. S. 591, where a similar decision of the lower Court was affirmed by this Court by an equally divided Court. After examining the briefs in the Duke case, it appears that there were certain important points as to the nature and extent of the control reserved by the settlor which tended to distinguish that case, and which we are inclined to believe explain the division in this Court.)

The decisions of this Court in the *Chase Bank* case and in the case of *Tyler* v. *United States,* 281 U. S. 497, which are so much relied on by the Government, furnish no assistance in determining the scope and effect of Section 402 (f) of the 1918 Act, nor in attempting to explain away *May* v. *Heiner,* the *McCormick* case, and other similar cases, for the cases relied on by the Government dealt solely with the *power* of Congress, and not the *intent* of Congress. As pointed out by this Court in *Helvering* v. *Grinnell,* 294 U. S. 153, neither of those two cases "sheds any light upon the meaning and application of the statutory provisions. In neither of the cases was the Court concerned with the meaning of the Act. The sole question for determination was as

to the constitutional validity of the Act." The same thing applies as to *Saltonstall* v. *Saltonstall*, 276 U. S. 260.

In the Court below, the Government in its brief said:

> "The question in every case is not whether there has been a transfer, in the strict sense of the term, of property by death, but whether death has brought into being or ripened for the recipient of the donor's bounty valuable property rights not theretofore enjoyed. *Tyler* v. *United States*, 281 U. S. 497."

While that might well be the question in a case involving the constitutional validity of the statute, obviously such an argument has no place in the case at bar, where the question is as to whether Section 402 (f) of the 1918 Act was intended to apply to policies where the beneficiaries' interest had been irrevocably established beyond all possibility of control by the decedent *before* that Act was passed.

The Government in the Court below relied on *Sargent* v. *White*, 50 F. (2) 410, but fails to point out that the facts in that case were practically identical with those in the *Klein* case, in that a life estate was given to the wife, with remainder *to the grantor;* if, however, the wife survived it was to become hers absolutely. It also fails to point out that in *Nichols* v. *Bradley*, 27 F. (2) 47, decided by the same Court, where there was a trust of substantially the same kind as that involved in the *McCormick* case, that same Court held that in such case the beneficiaries' rights passed to them at once upon the declaration of trust subject to defeasance in case they failed to survive the trustor, and that the trustor's death merely "foreclosed the possibility of her

acquiring a reversionary interest" in the property, and that, therefore, no tax liability arose at her death.

We believe that it is a matter of common knowledge that in the overwhelming majority of insurance policies which were in existence when the 1918 Act was passed, the interests of the beneficiaries were subject to be divested if they did not survive the insured, in which case the policies would be payable to the decedent's estate. While the language of the various provisos or conditional clauses varied considerably (see pp. 8–9, *supra*), nevertheless, so far as we have been able to discover, no Court or other tribunal, until the decision of the Court below in the case at bar and the Court of Claims in the Industrial Trust Company case,* has ever considered that the interest of the beneficiary was other than an absolutely vested one, subject only to the possibility of its being divested in case of the beneficiary's death prior to that of the insured. The situation as to such policies is, we submit, quite analogous to that in *May* v. *Heiner*, the *McCormick*, and the *Wallace* case, and far different from that in the *Klein* case.

* In the case of *Ballard* v. *Helburn* (unreported officially) in the District Court for the Western District of Kentucky, May 2, 1933 (for a copy of the decision see C. C. H. 1933 Fed. Tax Law, Par. 9338), the Court, in a well reasoned opinion, rejected the Government's contention that the proceeds of two policies were taxable under the 1926 Act where the decedent had assigned the policies to the wife, if living, otherwise to the daughter, if living, and if not, then to his own estate, and he had no control over the policies or their proceeds. This case has been argued on appeal in the Sixth Circuit, but we understand that the decision is to be withheld until after the decision of this Court in the case at bar.

## II.

**IF, NOTWITHSTANDING THE FRICK CASE AND THE CASES ABOVE REFERRED TO, THIS COURT FEELS THAT WE GET TO THE CONSTITUTIONAL POINT, WE SUBMIT THAT, INASMUCH AS THE DECEDENT RETAINED NO CONTROL OVER THE POLICIES OR THEIR PROCEEDS, AND AS THE RIGHTS OF THE BENEFICIARIES WERE BEYOND THE CONTROL OF THE DECEDENT BEFORE THE 1918 ACT WAS PASSED, THE CONSTITUTIONAL POINT IS ALREADY SETTLED AGAINST THE GOVERNMENT BY THE CASE OF NICHOLS v. COOLIDGE, 274 U. S. 531.**

In this connection we refer also to the case of *Coolidge* v. *Long*, 282 U. S. 582, involving the constitutionality of the Massachusetts inheritance tax. In this case a husband and wife transferred property to trustees in 1907 in trust to pay the income to the settlors during their joint lives and the life of the survivor, and on the death of the survivor to divide the property among their sons, provided that if any son should predecease the survivor of the settlors his share should go to his heirs at the death of such survivor. There was no power of revocation, modification or termination. This Court held that the inheritance tax was unconstitutional. At page 597–8 this Court said:

> "It was a grant *in praesenti* to be possessed and enjoyed by the son upon the death of such survivor. . . . The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. . . . *Upon the happening of the event without more, the trustees were bound to hand over the property to the beneficiaries.* Neither the death of Mrs. Coolidge

> nor of her husband *was a generating source of any right in the remaindermen. . . . Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts,* were derived solely from the deed."

This language, with but slight paraphasing, we submit is equally applicable to the situation in the case at bar.

In *Coolidge* v. *Long,* this Court also said at page 596:

> "In *Nichols* v. *Coolidge,* 274 U. S. 531, we considered the trust deed of Mr. Coolidge that is now before us. The question in that case was whether the value of the property so conveyed prior to the enactment should be included in her estate for the purpose of ascertaining the federal estate tax thereon. We said (p. 542): 'This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. . . . And we must conclude that § 402 (c) of the statute here under consideration (the 1918 Act) insofar as it requires that there shall be included in the gross estate the value of property *transferred by a decedent prior to its passage* merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation'."

Again at page 599 the Court said:

> "No Act of Congress has been held by this Court to impose a tax upon posession and enjoyment, the right to which had fully vested prior to the enactment."

This case also distinguishes the case of *Tyler* v. *United States,* 281 U. S. 497, so much relied upon by the Government in the case at bar, pointing out at page 599

that "putting aside a common law fiction [that case dealt with a tenancy by the entirety] and having regard to substance, the death of one of the parties was in fact the generating source of important and definite accessions to the *property rights* of the other".

In the case of *Gwinn* v. *Commissioner,* 287 U. S. 224 at 229, a case holding that the interest of a joint tenant must be included in the gross estate even though the tenancy was created before the Act, this Court distinguishes *Nichols* v. *Coolidge* and *Coolidge* v. *Long* by pointing out that "In them the rights of the survivors became finally and definitely fixed before the passage of the Act—nothing was added as the result of death." At page 229 this Court pointed out that in a joint tenancy the rights of the possible survivor were not irrevocably fixed at the time of the creation of the tenancy "since under the state laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, by any involuntary alienation under an execution. The right to effect these changes in the estate was not terminated until the co-tenant's death. *Cessation of this power after* enactment of the Revenue Act of 1924 presented proper occasion for imposition of the tax. The death became the generating source of definite accessions to the survivor's property rights."

The *per curiam* decision of this Court in *Third National Bank* v. *White,* 287 U. S. 577, makes it clear that this Court treats a tenancy by the entirety to be in substance the same as a joint tenancy, so far as estate taxes are concerned, for it cites the *Gwinn* case.

In the case of the insurance policies in the case at bar the rights of the beneficiaries had been irrevocably fixed so far as Mr. Upton was concerned long before

the 1918 Act. His death *added nothing* to Mrs. Upton's *rights* to the proceeds. There was no cessation after the enactment of the 1918 Act of any *power* which could have affected their rights.

As pointed out above in this brief, the Government can get no comfort out of the *Chase Bank* case for not only did it involve policies taken out *after* the Act in question, but its decision was clearly based on the fact that the decedent had retained some of the legal incidents of ownership, none of which were retained in the case at bar. We submit, therefore, that that case supports the taxpayer's rather than the Governments's position on the constitutional point in the case at bar.

In the Court below, the Government referred to Judge Brewster's decision in *Sampson* v. *United States,* 1 Fed. Supp. 95. It is to be noted, nowever, that that case dealt with a later act and that the questions discussed in the *Sampson* case are not involved in the case at bar unless the *Frick* case first be held to be no longer law as to the proper construction of the 1918 Act. Furthermore, an examination of the opinion in the *Sampson* case will make it clear that Judge Brewster's decision in that case really hinged upon his conclusion that the decedent had retained some measure of control over the policies, such as the power to surrender them for cash or to borrow on them, and *that he recognized that otherwise the tax would have been unconstitutional,* citing *Nichols* v. *Coolidge,* 274 U. S. 531, *May* v. *Heiner,* and the *Reinecke* case. In the case at bar the decedent had no such control, for he could do nothing with the policies without the consent of the beneficiary.

## III.

### CONCLUSION.

The case at bar is squarely within the *Frick* case. The *Frick* case is controlling where the tax is claimed under the Revenue Act of 1918 as to such policies as are here involved, and the tax in the case at bar cannot be sustained without overruling that case. It is inconceivable that this Court, having established that the 1918 Act should not be construed to apply to such policies as are here involved, should overrule itself and declare that Congress meant just the opposite by that Act from what this Court had previously said it meant. Even without the *Frick* case, the decisions of this Court in *May* v. *Heiner* and the *McCormick* case, which dealt with the construction of Section 402 (c) of the 1918 Act, should require the conclusion that Section 402 (f) of the 1918 Act did not apply to the policies here involved. Finally, if Section 402 (f) of the 1918 Act be now held to apply to these policies, it would be to that extent unconstitutional.

Wherefore, the taxpayers respectfully submit that the decision in the Court below should be reversed and the decision of the District Court affirmed.

Respectfully submitted,

GEORGE S. FULLER,

*Attorney for Petitioners.*